DUELLO,

or, R2623.

SINGLE COMBAT:

From *Antiquity* derived into this

Kingdom of *England*;

With several Kinds and *Ceremonious Forms* thereof from good Authority described.

By the Learned Mr. SELDEN.

Printed in the Year 1610. And now Re-printed.

Ἐὰν δέ τις ἀθλῇ, οὐ στεφανοῦται, ἐὰν μὴ νομίμως ἀθλήσῃ. 2. *Ad Timoth.* 2. 5.

LONDON:

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929

V.

CLARISSIMO

D.

EDWARDO CARRELL

ab Harting

EQUITI AURATO

DICAT

MONUMENTUM

ET

PIGNUS AMORIS.

J. S.

V.

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EQUITI AURATO

DICAT

MONUMENTUM

ET

PIGNUS AMORIS.

J. S.

TO THE READER: ΕΥΦΗΜΕΙΝ.

READER,

I Open not a Fence-School, nor ſhall you here learn the Skill of an Encounter, or advantagiouſly in the Liſts to traverſe your Ground. Hiſtorical Tradition of Uſe, and Succinct Deſcription of Ceremony, are my Ends; both * deduced from the Ancients, but without proſelenia; Affectation. My Aimes ſhall take him for an Advocate, which long ſince affirmed the full pleaſing Syrens to be but Allegories of Antique Records: Indeed I think his Speech was beyond his Proof, but the God of Poets could not without † παλαία τι, by πολλά τὸ

* Heraclides Ponticus.
† Echeneus in Odyſſ. ω.

εἰδώς,

don, express the best of his Phæaces. *And I dare avow it, he which distasts* true primordial Deduction, *falls often into that Covert Dotage of,* * Errabo potius, quam perductet quispiam. *Ancient Writ is the Leader in what Passages I have drawn; all being but as an* Epocha, *from whence the single and simple Motions of our* Triplicity Lord Mars *are (omitting their Effects and tempred Influences) with their Differences calculated. Censure as you please; but however, like old* † Demipho's *Lawyers, so (at worst I doubt not) will my* Readers. *With this Comfort I regard all Thumb-turning, and fear not the truly Judicious. Best of the Supreme Aspects, bestow their Rays on you.*

From the I. *Temple*
this xth of *Decem.*
CIↃDCIX.

* *Plaut. in Mostell.*
† *Terent. in Phor.*

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Capitulorum Elenchus.

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THE

VII

THE DUELLO, OR, *Single* COMBAT.

CHAP. I.

The Name and Notation of the Duello.

THE Name (for the true Notation of the Subject is in no Treatise to be neglected, but the very Auspicy of Lerter-Labour, by Logick Doctrine, is thence to be taken) of the *Duello* or *Duellum*, is after some *Quasi duorum Bellum*, while others judge that this Derivation stands rather conceited upon the Affinity of similary Sound in Pronunciation than true Criticism. Authentick Writers of the *Latin* have *Duellum* unlimited in Number, and of equal large Signification with *Bellum*; * *Græcia Barbariæ lento collisa Duello*, hath *Horace*; and likewise in † *Livy*, *Puro*,

* *Horat. Epist.* lib. 1. ep. 2. † *Liv.* lib. 1.

pioque Duello quærendas rès censeo, saith one of the Senators upon his Advice to *Ancus Martius*. *Perduellis* also in old *Ennius* keeps like Rank with *Hostis*, *Perduellum*, *Duellum & Bellum*, being upon Learned * *Varro*'s Testimony, and in † *Plautus* but Synonomies, as *Duellona* and *Bellona*. To all these agreeth || *Festus*, deriving it, *Quod duabus partibus de Victoria contendentibus dimicatur*, referring it to the contrary Terms of a general Quarrel, not to that single Opposition which the *French* call Combat, *Seul à seul*, the old *Saxons* Camp-Fight, our *English* Single-Fight, fully and significantly expres'd in the *Greek* Μονομαχία, under Breath of one Word.

But as many well impos'd Names feel the diverse Effects of Time and Custom's Syllabick Alteration from the first Nature of their genuine Root, insomuch that great ‡ *Plato* durst only find fault with, not correct the crept-in Errors of that Nature in his Time; so questionless whole Applications of Names to their now reputed Subjects have been oftentimes very disorderly made, yet too currently admitted by the quiet Approbation of Posterity. And *Etymologists*, aiming at the conjoined Nature of the Word and Thing signified, as commonly miss as hit their Mark. * *Justinian*'s Rule (upon the mistaken Name of a Legatary) being but in one Word alter'd, shall free me from

* *Varro de Ling. Lat.* lib. 6.

† *Plaut. in Amphitr. 1. 1.*

|| *Fest. in verb. Duellum. Duis apud antiquos sæpius in B. mutat. quod vide apud P. Merulam ad lib. 1. annal. Ennii.*

‡ *Plat. in Cratylo.*

* *Instit. tit. de leg. fect. si quis. in nemine.*

farther

further Inquisition of needless Respect to hard Names. *Nomina significant dorum rerum gratia, non rerum suarum, quæ si aliter quoliber modo intelligantur, nihil interest*, saith the Emperor. Truth and the Application of this Word *Duellum* to single Fight have had both one Father (especially in this Kingdom, where Time both establisheth and abrogateth.) It were therefore Injury in me to offer Cause of Breach to this Sisterhood, or to baffle the one, Time's hoary Age being contrary to, and far from all just Imputation of natural Weakness. The *Duell* then (you may use at your Pleasure any of the other Names) *is the bodily Opposition of two Combatants, both aiming at victorious Success.* Other and divers are the Definitions of it among Civilians, which for the most part call it, not *Pugna duorum*, but *Duarum partium citra formam belli dimicantium*, as upon the Example of the *Horatii* and *Curiatii* in the *Roman* History, which exceeded Unity on both Sides † Dr. *Beurher* concludes. His Definition is the last (as I take it) yet not so perfect as new. It were audacious to examine it, much more to affirm any other in all Numbers absolute. Only this much I see not why two or three on a Side are not by Power of a like continued Addition, as nearly equal to *Xerxes*'s Myriads as a Million, the least of Numbers being as well contain'd under that ‖ *Maximum* as the greatest. But in

* *Hominum in ipso textu.*

† *Beuther. disp. de duel concl.* 1.

‖ *Euclidis definitio numeri 7. Elem. def.* 2.

these legal Matters, touch'd with such or other Logick Niceties, the Law thus excuses, * *Quando dubitatio in Jure Civili periculosa est prorsus ejus ne vestigium subverti possit.* Those two Parts, *Genus* & *Differentia specifica* cannot be always, and seldom are according to Aristotelick Learning in Definitions of Law-Subjects. To conclude this, accept the Name's Notation as your Phantasie perswades, or true Signification as your Judgment directs, although (I confess) you may possibly find me erring in one, which if you correct, you may chance as soon to err as another, but to your Correction with Respect I submit me.

CHAP. II.

Of Extrajudicial Duels: *That for contracting the Adventure of a greater War into a less Number, it hath been by the Ancients used, and by the Judicious without Controversie allow'd.*

TO diminish imminent Danger of a greater Blood-shed, Antiquity oft-times made choice of the *Duello* most commonly as we describe it, 'twixt two Combatants, (altho' sometimes into a greater Number, yet rarely hath this Contraction been made.) In the *Trojan* War *Homer* testifies of † *Diomedes* and *Æneas*, *Paris* and

* *ff. de Reg. Jur. l.* 202.
† *Iliad. y.* 6. & 11.

Mene-

Manlius, *Hector* and *Ajax*, an assaying by Single Combat to decide the bloody Controversie of two the most famous People of the *Gentile* had *Ilus* Leader of the *Arbenians*, and *Evander* of the *Arcadian* Forces by personal Conflict strive in * *Herodotus* to transact their Controversie of priority in the Army, as also to determine the right of the *Heraclean* Stock in their Fathers Possessions. The Raging War with the *Albans* referred all to the Success of the *Curiatii* and *Horatii*, who determined it by Victory atchieved by the *Horatii*. Of like Nature (the hidden Secret of Gods particular Providence exempted) was that of little *David* and great *Goliah* in ‖ Holy Writ reported; as also of the *British Arthur* and *Rollo* Tribune of the Emperor *Leo* in *Gaul*, after † *Geffrey* of *Monmouth* his relation. Not different was the Offer of *Lewis* the first Christian King of the *Franks* to *Alaricus* King of the *Visigothes*, *nobilissimo pari fortunam* (as ‡ *Aimoinus* writes) *utriusque gentis decretum iri*. And in the latter memory of our Ancestors, a general sedition twixt the *French* and *Italian* conjoyned Armies was epitomized into a select Number (as ¶ *Guicciardine* reports) of thirteen Soldiers of each Nation. *George* † *Castriot*, alias *Scanderbeg* overcame *Ferhasse* in like Fight. Of these and like Examples in fo-

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* *In Calliope.*
† *Dionys. Halicar. lib. 3. antiq. Rom. Liv. lib. 1.*
‖ *1 Reg. Cap. 17.*
* *Galfred. Monumeth. lib. 7. cap. 3.*
† *P. Æmylius lib. 1. in Childeb.*
¶ *Guicciard. lib. 5. hist. Ital.*
† *Hist. Scanderbeg. lib. 5.*

on reign

reign Subjects is frequent mention; nor in the English are they wanting. *Danish* Irruptions and the bad Aspects of *Mars* having drenched the common mother Earth with her Sons Blood-streams, under the Reign of *Edmund* a *Saxon* Monarch, *missis in compendium* (so worthy * *Camden* expresses it) *bellis utrinsque gentis fatis Edmundo Anglorum & Canuto Danorum regibus contigisse fuerunt, qui singulari certamine de summa imperii in hac Insula* (that is the Eight in *Gloucestershire*) *depugnarunt.* Agreeing hereunto was that one and late condition of the three, which the Duke of *Northumberland* before his Conquest offered to King *Harold*, † *ut scilicet spectante exercitu gladiorum vicissitaret.* So was it offered between || *John* of *England*, and *Lewis* of *France*, that by a single Champion on both parts, their controverted rights to certain Forts should be brought to decision. Neither did * *Richard* of that Name the Second hence degenerate, in challenging the *French Charles* the Sixth, upon that Royal Quarrel of best Title to the *Flowers de lis*. The Justice of Combats in this kind (so the the whole Wars be just) is approved by judicious Writers, ‡ *Frisius*, *Ayala*, *Gentilis*, *Bodin* and others. *Non interest prius* (saith *Bodin*) *quo numero adversus hostes decernatur*; learned || *Alciat* making

* *Henric. Huntingd. lib. 6. hist. edit. Germ. fol. 363. Camden. in Dobunis.*

† *Guil. Malmes. lib. 3. de gestis reg. Angliæ fol. 86.*

|| *Annal. Hibern. nuperrime edit. fol. 797*

* *Rot. Parlam. 7 Rich. 2.*

‡ *Fris. de rep. lib. 1. c. 26. Ayala lib. 1. cap. 3. Bodin. de rep. cap. 4. lib. 7. Alber. Gentil. de jure belli. l. 1. c. 3.*

|| *Alciat. de sing. certam. lib. c. 3.*

no

no doubt, but that Princes of whose Kingdome Controversies no Earthly Magistrate hath Jurisdiction, may upon force of their private Credit with *Bellona*, discuss whatsoever their publick Wrongs. *Cum enim* (says he) *bellum non nisi magna calamitate humani generis invehatur, quid justius excogitari potest, quam ut tanta noxa de medio sublata, bi potissimum soli armis decernant ad quos ea res pertinet, victoremque res sequatur?* where † he vouches the appointed lists at *Bourdeaux*, twixt *Charles* of *Anjou*, and *Peter* of *Arragon*, for triall of Right to the Crown of *Sicily*, which was allow'd by *Pope Martin* and the whole College of Cardinals, whereunto he adds a second, of two Brethren of *Hungary*. *Haec est necessitas quae bellum justificat* (saith * a great Civilian) *cum ad bellum extremo loco confugitur.* Antiquity hath allow'd it, Reason confirm'd it, therefore so I leave it.

† *Inditum fuisse de Sicilia vicem duellum & pluries refert, & in eo notatu dignissimo Paris de Puteo lib. 3. cap. 3.*

* *Bald. 3. cons. fil. 493.*

CHAP.

CHAP. III.

For proof of Manhood also in divers Forms, and upon several occasions use of it is found both in the Monuments of inmost Antiquity, as also in the later Ages, and always for this Purpose as dedicated to HONOR, *and by the Princes Authority.*

TO omit those servile *Gladiatores* of * *Rome* in whose saleable Blood the Amphitheater's sandy Floor so oft wash'd it self as Lady *Mary* requested, until *Augustus* restrain'd this publick Spectacle to twice only in a Year; and *Constantine* utterly abrogated the use of them.) The old *Grecians* had their *Olympian* Games instituted by *Hercules*, celebrated every fourth Year; their *Pythian* from *Apollo*, in which the Gods themselves are said to have judg'd it Honour to have receiv'd the Chaplet of Bays; their *Nemean* dedicated to *Archimorus*, their *Isthmian* establish'd by *Theseus*; in all which although there were five sorts of Tryal of Activity (which they call'd *Pentathlon*, in Latin *Quinquertium*, yet the chief and most respected was ἀγὼν ἱππικὸς, i. e. ei-

* *Dio. lib.* 54 *C. de glad. toll. l. unica. Cruenta spectacula in otio civili & domestica quiete non placent quapropter omnino gladiatores esse prohibemus, & vid. Othon. Frisingen. lib.* 4. *cap.* 3.

De his siquidem plura velis, adi Natalem Comitem lib. 5. *Mythol. cap.* 1. *& seq.*

ther

ther hand-fights or wrastling, both for Use and Antiquity, to have preheminence of the other three, as upon that Acrostich of † *Homer*, and other such Passages of his, ‖ *Plutarch* long since specially observed. What regard to these two sorts (which not amiss may be stil'd single Combats) the Ancients had, *Ulysses* his Entertainment at *Alcinous* his Palace describ'd in the * Odysses, and his Victory with others at *Patroclus* his Funerall towards the end of the Iliads give Testimony sufficient, although no more could be gotten. But as *Achilles* did there at his Friends Exequies so did ‡ *Æneas* at that honoured Day of the anniversary Rites perform'd to his interr'd Father, to this Purpose making his Edict †

——— *qui, viribus audax*
Seu crudo fidit pugnam committere cestu
Cunctis ad sint meritæque expectent præmia palmæ.

The learned Poet doubtless alluding to the Custom used after *Grecian* Victories in that Quaternity of Games, which was (as ‖ *Pausanias* witnesseth) that besides their deserv'd Garlands of ‖ *Olive, Bays, Parsley, Pine*, or such like, the Victors did continually carry a palm-branch in one of their

† *Odyss.* θ.
‖ *Plutarch. Sympos. lib.* 2. *cap.* 4. & 5.
* *Odyss.* θ. *Iliad.* ψ.
‡ *Æneid lib.* 5.
‖ *Pausan. in Arcadicis.*
‖ *Victores in uno quovis certamine Hieronicæ, in omnibus Periodi appellabuntur. Fest. & Bernhard. ad lib.* 6. *Thibaid.*

hands, which being atchiev'd by Superiority in all four, is by ‖ *Cicero* affirmed, *apud Græcos propè majus & glorioſius, quam Romæ triumphaſſe.* Which by *Statius* in his Preface to the Combat 'twixt *Capaneus* and *Alcidamas* is thus proportionatly affirm'd.

† *Nunc opus eſt animis infeſtos tollere ceſtus*
Comminus hæc bellis & ferro proxima virtus.

Thus is it moſt apparent that the chieſeſt honour among the Ancient (both *Trojan* and *Greeks*) conſiſted in the deſerv'd Crowns of thoſe Duello-Victories, nor found they better form of honouring the Memory of the ſuppos'd airy Ghoſts of their dead ſleeping Friends or Anceſtors, than ſuch kind of Parentation. The * *Punick* Cuſtom agreed with it, as in the laſt honor of betrayed *Graecchus* ordered by *Hannibal* is regiſtred. The *Romans* failed not in like Duty and Practiſe; A whole Place of *Livy* tranſcribed ſhews it, and thus ſhews itſelf ‖ *Scipio Carthaginem ad vota ſolvenda diis munuſque gladiatorium, quod mortis cauſa patris patruique paraverat edendum rediit; Gladiatorum ſpectaculum fuit, non ex eo genere hominum ex quo laniſtis comparare mos eſt, ſervorum delectu ac libertorum qui venalem ſanguinem habent; voluntaria omnis & gratuita opera pugnantium fuit; nam alii miſſi*

‖ *Orat. pro Flacco.*
* *Liv. Dec. 3. lib. 5.*
† *Stat. Theb. 6.*
‖ *Idem Dec. 3. l. 8. aſtipulantur quæ apud Tacitum, l. 2. annal. & Suetonium in Claud. cap. 1. Militaria iſta certamina funebres dicuntur decurſiones, Gallice* Jouſtes. *Hadrianus Junius in Nomenclatura.*

ab

ab regulis sunt ad specimen insitæ genti virtutis ostendendum, alii ipsi professi se pugnaturos in gratiam Ducis; alios æmulatio & certamen ut provocarent, provocatique haud abnuerent, traxit. Add to this but *Ulpian*'s Judgment in Law, and what the old State of *Rome* allow'd will be manifest; * *Si quis* (saith he) *in colluctatione, vel in pancratio, vel pugiles, dum inter se exercentur, alius alium occiderit siquidem in publico certamine cessat Aquilia; Quia gloriæ causa & virtutis, non injuriæ gratiâ videtur damnum datum.* Thus much for the more antick Ages. Middle times afford the like. † *Pancirollus*, after *Nicetas* affirms that *Manuel Commenus*, Emperor of *Constantinople* (his Government was about the Time of our *Stephen* and *Henry* II.) instituted Turnaments, which the *Italians* call *Giostre*, and the *French Joustres*, that is, Military Exercises in single Opposition for Exploration of Valour and Ostentation of Martial Vertue; which so far oft-times proceeded,

——— Ut ultima divideret mors,
Non aliam ob causam, nisi quod Virtus in utroque
Summa fuit ———

As of *Hector* and *Achilles*, ‖ *Horace* speaks. But long before *Manuel*'s Time, *Henry* of *Germany*, surnam'd, *The Fowler* (as my ‡ Authors tell me) was

* ff *Ad leg. Aquil. l. 7. qua actione huic persimile apud Athen. habes legem in Platone, lib. 7. de legib. Concers item, l. 2. ff. de alea-toribus arg.*

† *Pancirol. l. 2. rer. non rep. tit. 20.*

‖ *Horat. lib. 1. Sat. 7.*

‡ *Verstegan, cap. 4. Munster. in Cosmograph. lib. 3. Boter. de bello, lib. 2. cap. 4.*

in his own Territories Author hereof, annexing certain Laws, among which one was thus, That he, which was not of a generous Stock, *Deque ſua nobilitate quatuor avorum natalibus docere non poterit*, ſhould by no means be admitted as a Party in theſe Lance-Controverſies. The common Uſe of this kind is eaſily known by the Lateran Inhibition in a Council held under Pope *Alexander* III. (in our *Henry* II's Time) thus expreſſing itſelf; * *Felicis memoriæ Innocentii & Eugenii prædeceſſorum noſtrorum veſtigiis inhærentes, deteſtabiles illas Nundinas vel ferias quas vulgo Torneamenta vocant, in quibus milites ex conducto convenire ſolent, & ad oſtentationem virium ſuarum & audaciæ temerè congredi, unde mortes hominum & animarum pericula ſæpe proveniunt, fieri prohibemus*, &c.

But this notwithſtanding, when *Clement* V. underſtood that the Holy-Land-Voyage ordain'd in the Council of *Vienna* was much hinder'd by the provok'd Juſtes and Tournaments of the Croſs-Knights; † *Torneamenta ipſa & haſtiludia ſive Juxtas in Regnis*, Franciæ, Angliæ, & Almanniæ, *& aliis nonnullis provinciis in quibus ea conſuevere frequentius exerceri ſpecialiter interdixit*, binding the Offenders under anathematizing Conſtraint; Into which Puniſhment, becauſe divers Martials had nevertheleſs incurr'd, at the Inſtance of *Philip*, King of *France* and *Navarre*, Pope *John* XXII. *alias* (if you reckon Pope *Joan*) XXIII. *Clement*'s Succeſſor made (as his Extravagants teſtifie) for this purpoſe general Abſolution.

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* *Decret. lib.* 5. *tit.* 13. *& in Rogeri Hovedeni Annalibus, in Hen.* 2. *fol.* 333.

† *Extrau. de Torneamentis, c. unic. Tempore Ed.* 1.

Par-

Particularly for this Kingdom, you may remember the * *Round Table* (as it is reputed) of the three famous *Arthur*, kept at *Winchester*; but withal remember, that thereof *nihil eſt* (ſaith judicious † *Camden*) *quod dicam, niſi recentioris eſſe ætatis, ut intuenti facile appareat, Superioribus enim ſeculis, cum virtutis bellicæ exercendæ gratia militares decurſiones (Torneamenta vocant) frequenter haberentur, hujuſmodi menſis* (ſuch Tables alſo were uſed among the old Knights of *Gaul*, as *Athenæus* there cited, reporteth) *uſi erant, ne quod diſcrimen inter nobiles ex ambitione exiſteret.* Theſe kind of Honorary Combats by *Richard Cœur de Leon* were confin'd within the Liſts of Five Places in the Kingdom, you ſhall ſee his Patent of it to *Hubert*, then Archbiſhop of *Canterbury*: ‖ *Sciatis nos Conceſſiſſe quod Torneamenta ſint in* Anglia *in quinque placeis, inter* Sarum *&* Wilton, *inter* Warwick *&* Kelingworth, *inter* Stamford *&* Walingford, *inter* Brakely *&* Mixeber, *inter* Bly *&* Tikehill, *ita quod pax terræ meæ non infringetur. Et comes qui ibi torniari voluerit dabit nobis* 20 *Marcas, & Baro* 10 *Marcas, & Miles, qui terram habuerit,* 4 *Marcas & qui non habuerit* 2 *Marcas. Nullus autem extraneus ibi attorneabit; unde vobis mandamus quod ad diem Torneamenti habeatis ibi,* 2 *Clericos &* 2 *milites veſtros, ad capiendum ſacramentum de Comite & Barone quod vobis de predictâ pecuniâ ante Torneamentum ſatisfaciant, & quod nullum Torneare permittant antequam*

* Rotundæ Tabulæ *Arthuri* meminit *Monumethenſis*, l. 7. cap. 4. in eâ magnificentiam & comitatum regium addidit, Ordinis etiam ſed male *Miræus*, lib 2. *orig. equeſt.* cap. 4.

† *In Belgio*: *Athenæus*, lib. 4. *dipnoſoph.* c. 13.

‖ *Ex libro rubro ſcaccarii. Rich.* I.

ſuper

super hoc satisfecerit; & inbreviari faciant quantum & à quibus receperint. Et 10 *Marcas pro carta ad opus nostrum capiatis unde Comes* Sarum *& Comes de* Clara, *& Comes de* Warrena *plegii sunt. Teste meipso apud villam episcopi* 22 *die Augusti.* The Earl of *Gloucester* under *Henry* III. **confidens* (saith an old Monk) *de concessione* D. R. *obtentâ, & voce præconiâ ex parte ejus proclamatâ, die quâ* Gulielmum *fratrem suum balisheo einxit militari cepit unum torneamentum, apud* Northamtonam *feriendum, ut ibidem memoratus* Willielmus *cum suis contyronibus militiæ peritiam & addisceret, & experiretur.* But of this Licence, for fear of Inconvenience that might ensue through the boiling choller of such hot Bloods, Repeal was made with Intermination, † *Ne transgressorum hæredes de paterna gauderent hæreditate.* The like to what was here first licenced, was in his Time granted, and at *Rochester* perform'd 'twixt *English* and *Strangers, in quo contriti sunt turpiter alienigenæ,* saith *Matthew Paris,* that writes it. *Roger* of *Mortimer* founded at *Kelingworth,* ‖ *Ludum* (the Words of *Thomas* of *Walsingham*) *militarem, quem vocant Rotundam tabulam,* of an Hundred Knights, and as many Ladies, whither for Martial Exercise was very great Conflux out of divers Countries. Some Difference was between common Torneaments and this Ceremony of the Round Table, which was in use of ancient Time before this of the Lord *Mortimer*, and that among the Princes of the *Norman* Blood. The two Chronologers,

* 31 *Hen.* 3. *ex Math. Paris. pag.* 981.

† 34 *Hen.* 3. *ex eodem pag.* 1123.

‖ 7. *Ed.* 1 *Thom. de Walsingh. pag.* 49. *edit. novissimâ.*

† *Mat-*

† *Matthew* of *Paris*, and of *Weſtminſter*, remember that about 35 of *Henry* III. divers Knights appointed their Juſtes at *Walden* in *Eſſex*, and they both call them by the Name of the Round Table. But more eſpecially one of them thus; * *Conſtituerunt unanimiter, non ut in haſtiludio, illo quod communiter & vulgariter Torneamentum dicitur, ſed potius in illo ludo militari qui Menſa Rotunda dicitur, vires ſuas attemptarent*, where he inſerts the unfortunate Combat of two worthy Knights, *Heruald* of *Muntenny*, and *Roger* of *Lemburne*, who meeting at the full Career, *Lemburne*'s Lance (*cujus mucro* (ſaith he) *prout deberet non erat hebetatus*) ſo pierc'd *Heruald*'s Bever, that as ſoon Death pierc'd his Heart: Theſe few Examples, taken out of many more, ſhew the Uſe of theſe honourable Juſtes among the Ancients of this Kingdom, but ſo reſtrain'd as the Prince's Power in licencing or prohibiting (which is proved by divers Records alſo, Tranſcripts whereof I have ſeen in the Hands of the Right Worſhipful and Learned Knight Sir *Robert Cotton* of *Conington*, with Puniſhment adjoin'd *Sub forisfactura omnium quæ regi forisfacere poterit*) always as ſupreme Judge of Chivalry, claim'd and kept Prerogative.

† *Flor. hiſt. lib. 2. p. 2[illegible]. Edit. Veter.*

* *Matth. Pariſienſ. p. 1047. edit. prima.*

CHAP.

CHAP. IV.

A light Touch of Single Combat. Extrajudicial upon Quarrels, according to some that Authentiquely treat of them, and especially of English and French Custom.

UNto these *Extrajudicial* Duels hitherto spoken of (the one being under the general Name of publick Good for the Church or Commonwealth, the other under that which is for Exercise of Vertue, which consists in Action) may be added that of Free Provocation or Challenge, without the Prince's or Magistrates Authority, proceeding from Supposition of Dishonour received from the Party challenged. For * *Truth, Honour, Freedom* and *Courtesie*, being as Incidents to perfect Chivalry upon the Lye given, *Fame* impeached, *Body* wronged, or *Courtesie* taxed, († *Qu on a diffamé & deshonoré l'honneur des dames*, as one says) a Custom hath been among the *French, English, Burguignons, Italians, Almans*, and the Northern People (which, as *Ptolomy* notes, are always inclined to Liberty) to seek Revenge of their Wrongs on the Body of their Accuser, and that by private Combat, *Seul a Seul*, without Judicial Lists appointed them. St. *Lewis* first prohibited it in *France*, and divers times divers

* *Galfred. Chaucer. in epistle sua.*

† *Loisin. en le* Combat, &c. *P.* 1. *C.* 3. *Bodin. de Rep. lib.* 4. *cap.* 7.

of

of his Succeſſors in the ſame Point of Policy ſucceeded him; but both St. *Lewis* and the reſt were conſtrained (for the moſt part) to yield to the reſciſſory Petitions of their Subjects, who complained that the Reſtraint of Open Combats occaſioned multitudes of hidden Murthers. Nay, *Francis* of that Name the Firſt, is ſaid to have openly denied at his Council-Table, * *virum bonum eſſe qui mendacium oblatum armis non rejiceret*; ſtriking with thoſe Words (indeed) at *Charles* the Fifth, who had then lately pocketed up a Wrong of that Nature received from himſelf; which, if you may credit *Bodin*, became as clear Law among the Soldiers and Gentlemen of his Country. But upon a Combat between † *Jarnach* and *Chaſtegneray*, two *French* Gallants, wherein Death was Umpire by expiring the beſt Spirit of the One, the Quarrel being only for the *Lye given*; *Henry* the Second, by expreſs Edict, ‖ inhibited the *Duello* for future Times. Such after Edicts are Teſtimony ſufficient, how frequent Need hath been of them; and accordingly *Henry* of *Navarre*, now King there, ſome five Years ſince, publiſhed the like, and again very lately ſeconded himſelf ‡ by another Conſtitution made in *June* laſt, whereby all ſuch Provocation (without ſpecial Leave from the Prince's Perſon, his Conſtable or Mar-

* *Bodin. ibid.*

† *Dern. troubles in Hen.* 2. *ann.* 1547.

‖ *Conſtitutio iſta exarata eſt en l'hiſt. de la paix. lib.* 5. *per M. P. Victorem. fol.* 328.

‡ *Noviſſima verò jam Anglicè nuperrimè edita, in cujus Artic.* xiii. *iſta pœna.*

ſhal, or Lords Lieutenants of the Provinces) is forbidden; *under Pain to the Offender of being deprived from ever being able to make his Part good by Arms with any Man, as likewiſe from obtaining any Satisfaction or Amends for whatſoever Injury he ſhall pretend to have received.*

For our own Country, let this one Example be obſerved. Sir *Nicholas de Segrave*, a Baron in *Edward* the Firſt's Time, challenged one Sir *John de Crumbwell*, and becauſe the King's Prohibition reſtrained the Combat here in *England*, dared him into *France*, therein (as the Record mentioneth) ſubjecting, as much as in him lay, the Realm of *England* to the Realm of *France*. *Segrave* was hereupon ſtaid in his Paſſage at *Dover*, committed to the Caſtle, and afterward in the *King's-bench* confeſſed his Fault, and ſubmitted himſelf to the King, *de alto & baſſo*. Whereupon thus ſpeaks the Judgment, * *& ſuper hoc D. R. volens habere aviſamentum Comitum, Baronum, Magnatum, & aliorum de conſilio ſuo, injunxit iiſdem in homagio, & fidelitate, & ligeantia, quibus ei tenentur, quod ipſi fideliter conſiderent qualis pœna pro tali facto fuerit infligenda; qui omnes habito ſuper hoc conſilio dicunt, quod hujuſmodi factum meretur pœnam amiſſionis vitæ.* What they thus adjudged upon his Deſert, was (if I miſtake not) grounded more on their own exaſperated Conceit, than any *Engliſh* Cuſtom.

How this *Extrajudicial* Combat is lawful or contrary (I mean by the Law of Arms and the

* *Placit. de Term. Paſch.* 33. *Ed.* 1,

Impe-

Imperialls, although the Divine Law and Chriſtianity teach otherwiſe) thus I read, * *Licitè procederetur ſi injuriâ laceſſitus in ejuſmodi ſit territorio ubi decus & honorem ſuum ope judiciali non poſſit tueri (ut ſi copia judicis non fuerit). Illicitè, ſi judicis & injuriantis copiam habere poſſit.* † After divers Gloſſes and Commenters upon ſeveral Laws of the Pandects and Code (ſith Honour is not leſs, nay more than Life to be reſpected) my Triumvirate of Writers of this Subject, ‖ *Alciat* and the very late *Bocer*, and *Benther*, all great Lawyers, expreſly affirm as much in conſtant Concluſion, which ſhall conclude alſo theſe tripartite extrajudicial Forms; the fourth for Defence of Poſſeſſions from Injury and Rapin, failing in ſufficient Solemnity for Deſert of bearing a part in this Diviſion.

CHAP. V.

Firſt Authors of the Judicial Duel: *where admitted. The* Church *of* Rome's *Inhibition againſt it.*

NExt follow the *Judicial* ſort, which are by ſome legal or ordinary Proceeding managed, and are part of the Number of the ancient Trials, which were either *Canonicæ* or *Vul-*

* *Lactant. lib. de iræ dei.*

† *Arg. l. 9. ff. de manumiſſ. vindict.*

‖ *Alciat. de ſing. cert. cap.* 3. *Bocer. lib.* 2. *cap.* 8. *Benth. concluſ.* 76.

gares. The *Canonicæ* were such as rely'd upon Church-Doctrine and Religion; as especially *Oath*, and receiving the *Eucharist*, both which in *England* among the *Saxons* were in use. * The *Vulgares* (called *Exploratoriæ Purgationes*, or *Probæ*, were the ancient *Ordells* thus divided: *Fiery, Watry, and of Camp-fight*, which is the *Duello*. The two first omitted, (as also the Tryal of Witches, by casting them bound into the Water, or valuing their Weight never above a certain Poize and such like) the last only is the present Subject.

In those times, which the Philologers call *Mythique*, there is among † Poets somewhat not altogether unlike this kind of Tryal of doubtful right, (if you will admit that there is any preheminent Right among equally respected Wooers. He that could shoot best in *Ulysses*'s Bow was for Delay by *Penelope* herself judged as the worthiest of *Penelope*. || *Oenomaus*'s Proclamation of his Chariot-Courses to make Tryal who should enjoy *Hippodamia* (which *Pelops* through perfidious *Myrtillus* at length won) favours something of Respect to *Bellona*'s Judgment, for although in the Swiftness of their Coursers the Victory consisted, yet seeing †*Bello armantur equi, bellumque armenta minantur*, and great *Achilles* had his Education under a Centaur; this is a part as well of *Mars*'s Discipline, as close handy Strokes.

* *Leges Canuti, Can.* 5.
† *Odyss.* φ.
|| *Lucian in Charidemo.*
‡ *Virgil. Æneid.*

In

In the Time *Hiſtorique*, when the great Juſting at *Carthage* in *Spain* was appointed by *Scipio*, in honour of his Father and Uncle, two noble *Spaniards*, *Corbis* and *Orſua*, (Couſin-Germans) ſtriving for the Title of Superiority in a City there called *Ibis*, * *Non alium Deorum* (ſaith my Author) *hominumve quam Martem ſe judicem habituros eſſe profeſſi ſunt*: Although *Scipio* labour'd much for quiet Tranſaction of the Controverſie. Both having enter'd the Liſts, *Major* (ſaith *Livy*) *uſu armorum & aſtu facile ſtolidas vires minoris ſuperavit*. But it were too *Arcadian*-like to fetch hence, or out of theſe times, the Infancy or Beginnings of the *Duello*-Tryal by Courſe Judicial.

The Northern Inhabitants (as before is noted) have eſpecially of old time made uſe of this Form of ſearching out the hidden Truth. The *Ruſſians*, *Hungarians*, *Almans*, *Normans*, *Engliſh*, and others. But the moſt common Judgment of Writers, and clearly the trueſt, derives the Fountain thereof from the ancient *Lumbards*, (called, by reaſon of their long Beards, *Longobardi*) a People that (out of thoſe Northern Parts of *Europe*, which under the general Name of *Scandia*, contain *Norway*, *Swethland*, *Denmark*, and other Regions by North *High Germany*) over-ran ſome of the chief Countries of this Fourth part of the World, and indeed at the firſt, when they ſought thoſe new Habitations, try'd their Title of Safe-Paſſage through ſome Parts of *Germany* by ſingle Fight 'twixt one of their own Camp and (as

* *Liv. ab V. C. lib.* 28.

* *Paul*

Paul Warnfred reports) another of their Enemies. They were a Nation like enough to be Fathers of ſuch a Child, which is alone teſtified in that of † *Tacitus*, writing of the Largeneſs of ſome of their Neighbours States: *Contra Longobardos paucitas nobilitat*: (So neat *Lipſius* reads it) *Quod plurimis ac valentiſſimis nationibus cincti non per obſequium, ſed præliis & periclitando tuti ſunt*: Nay, the ſame Author hath in expreſs Terms, that which directly taſtes of this trying Monomachy among ſome of the adjoining People of that Climate: ‖*Ejus gentis* (ſaith he) *cum qua bellum eſt, captivum quoquo modo interceptum, cum electo popularium ſuorum patriis quenque armis committunt, victoria hujus vel illius pro præjudicio accipitur.* But for the matter itſelf without longer Circumſtances * *Longobardorum* (ſo ſays my *Italian* Hiſtoriographer) *antiqua eſt conſuetudo, ut crimina vel maxima ſingulari prælio purgarentur, quæ, poſteà per leges tranſlata per multa tempora obſervata eſt.* Inſomuch that, by ſpecial Conſtitution of † *Fronto* (*alias Frotho*) King of the *Danes*, all Controverſies took this for their Touch-ſtone, until ſuch time as King *Poppo* a Chriſtian, (thinking wronged *Vulcan* to be a better Judge than wronging *Mars*) by new Induction of the *Fiery Ordell*, made thereof Abrogation. ‡ After the *Gothick* Irruptions into the

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* *Paul. Warnfred. de geſt. Longobard. lib.* 1. *cap.* 12.
† *Tacit. de morib. Germanorum.*
‖ *Tacitus, ibid.*
* *Carol. Sigon. hiſt. de regno Italiæ, lib.* 2.
† *Saxo Grammatic. hiſt. Daniæ, lib.* 5, *&* 10.
‡ *Martin. del. Rio. diſq. Magi. lib.* 4. *q.* 4. *ſect.* 2.

Em-

Empire, and the *Lombards* Power and Cuſtoms enlarged, the reſt (not without the Allowance of one of the Pope *Johns*) of *Germany*, *France*, and *Spain*, not in *Criminal* only, but alſo in *Civil* Cauſes have Admittance of it; and howſoever * *Rhotaris*, a *Lombard* King, once prohibited it, yet he was conſtrained afterwards to reſtore it. But for the moſt part the Church of *Rome* hath impugned it with her Authority. Pope *Nicholas* I. forbad the Emperor *Lothar* to try his Wife's ſuſpected Chaſtity by the appointed Combat of two elected Champions, † *cum hoc* (ſo he wrote) *& hujuſmodi ſectantes Deum ſolummodò tentare videantur*, ſo did *Celeſtine* the Third, and other Biſhops of that See; laſt of all thus thunders the Council of *Trent*: || *Imperator, Reges, Duces, Principes, Marchiones, Comites, & quocunque alio nomine, Domini temporales, qui locum ad Monomachiam in terris ſuis inter Chriſtianos conceſſerint, eo ipſo ſint excommunicati: Ac Jurisdictione & dominio civitatis, caſtri, aut loci in quo, vel apud quem duellum fieri permiſerint quod ab Eccleſia obtinent, privati intelligantur, &, ſi feudalia ſint, directis Dominis ſtatim acquirantur. Qui verò pugnam commiſerint, & qui eorum patrini vocantur, excommunicationis & omnium bonorum ſuorum proſcriptionis & perpetuæ infamiæ pœnam incurrant, & ut homicidæ juxta ſacros canones puniri debent,*

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* *Bodin. de repub. lib.* 4. *cap.* 7. *ex legibus Longobard.*

† *Cauſ.* 2. *Queſt.* 5. *cap* 22. *monomachiam & Decret. tit. de vulgari purgatione.*

|| *Concil. Trident ſeſſ.* 9. *can.* 19. *part* 2.

& si in ipsa conflictu decesserint, perpetuâ carere ecclesiasticâ sepulturâ. Illis etiam, qui consilium in causa Duelli, tam in jure quam facto dederint, aut alio quocunque ratione, ad id quenquam suaserint, nec non spectatores excommunicationis ac perpetuo maledictionis vinculo teneantur. Non obstante quocunque privilegio, seu prava consuetudine etiam immemorabili. To those which were the observant Sons of the *Roman* Church, this and the other Decrees extend their Inhibitions; But the *English* Customs never permitted themselves to be subjected to such Clergy-Canons; * always (under Parliament Correction) retaining, as whatsoever they have by long Use or Allowance approved, so this of the *Duel*; which how it first came into this Kingdom, stands next to be inquired.

CHAP. VI.

Whence England *received it? if from the* Normans?

I Think it not easy to prove this Custom in *England* before the *Norman* Conquest; yet it appears, that the ancient *Germans* (who were the Fathers of the *English*) made some use of it, and † *Verstegan* (in his Chapter of the old manner of Living of the *Saxons*) out of good Authority, numbers his *Camp-fight*, (whence comes

* *V. Smith, lib. 2. de rep. Anglorum, cap. 7.*

† *Verstegan, pag. 64, & 300.*

our

our *English* Names of *Kemp*, and *Campion*, for a Combat-fighter) among the four *Ordelli*, which then purged or condemned as Mute Judges. Add hereunto the Judgment of * *William Rouille d'Alençon*, in his Preface to the old *grand Custumier du Normandie*; making the *Norman* Customs (among which the *Duel* is one) to owe their Original to *England*, rather than the *English* to *Normandy*. His Words, because they touch the generality of our Common-Laws, shall not be left without a room here; † *At hujusce Normannicæ consuetudinis* (speaking of the whole Custumary) *latorem sive datorem S. Edwardum Angliæ regem testatur vulgaris illa Cronica, quæ Cronica Cronicorum intitulatur: ubi de Gulielmo Bastardo Normannorum Duce, alias Anglorum rege, loquitur dicens, quod, cum prædictus S. Edwardus ex se liberos heredes nullos haberet, Gulielmum regni hæredem instituit, qui, devicto & mortuo Haroldo regni usurpatore, hac conditione regno liberè potitus est, ut scilicet leges prius à præfato Edwardo latas servaret; qui quidem Edwardus leges etiam Normannis dederat, etiam cum Normannia diu fuisset enutritus.* But all this persuadeth not such Antiquity of the *English Duel*. The old *Saxon* Laws of *Alfred*, *Edward*, *Athelstane*, *Edmund*, *Edgar*, or others of those Times are silent

* *Guil. le Rouille Alençonienſis in præſat. à le grand. Cuſt. du Normandy.*

† *Atqui, lector, adeas, ſi de his conſulas, Rogerum de Hoved n in 2. part. annalium fol.* 346. *& ſeq. G. inſuper Camdenum & Lambardum in explic. verb. & noviſſimè quæ ſunt a honoratiſſimo & J. C. tiſſimo V. D. Ed. Coke Eq. aurato & priva orum judiciorum prætori ſummo ad tertium librum reſponſorum edita, & maxime quæ ab iiſdem o Gervaſio Tilburienſi tranſcribuntur.*

of any such Matter; nor, as I remember, have the Monkish Stories of that Age any Authority for Proof of it. Only in * *William* of *Malmsbury* Relation is made of a Combat fought, and a Champion slain (upon proof of the by-insimulation Wronged-Chastity of *Gunhilda* Daughter to *Hardknot* and Wife of *Henry* the Third of *Germany*) but this was out of the *English* Territory; wherefore, although the one part was *English*, nothing to our purpose is hence gathered. But in the Laws of † *William* the First, it is decreed, that if a *Frenchman* appeal an *Englishman* of *Perjury*, *Murther*, *Theft*, *Man-slaughter* or *Robbery*, *Anglus se defendat per quod melius voluerit, aut judicio ferri,* || *aut Duello.* It rests therefore, that we admit that the *Normans*, *alias Northmans* (being by their first Off-spring from the *Norwegian* Coast, where this Custom, as before is shewed, had his breeding) were the first Authors of it in this their conquered Kingdom.

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* *Malmesbur. de gest. reg. li.* 2 *cap.* 12.

† *Leg. Guil. Conq. apud Lamb. fol.* 125.

|| *Ferri nimirum igniti, cujus formam explicatissime habes in Antiq. Eccles. Brit. & in Lamb. explic. verb.*

CHAP.

CHAP. VII.

The Division *of the Duel Judicial, as of Judgments; the Form out of the* Common-Law *till the Lists entred (with Authority and Examples) of* Criminal Duel.

GEnerally it being thus from the Ancients brought into *England*, what follows of it also shall be within *England* chiefly confined. As the Division of Judgments is * bipartite, consisting either in punishment of Misdeeds committed against the Body of the State, or determination of Controversies touching only particular Persons, which in fewest Words is expressed by *Publick* and *Private*, *Criminal* and *Civil*; so (if the *Trial* be denominated from the Judgment,) the same distinction may be admitted in the *Duel*, to be either *Criminal* or *Civil*: *Criminal* being waged for Purgation of an imputed *Crime*, *Civil* when for deciding Controversy touching Private Wrongs or Interests.

Particularly for the first, the Offences (which are comprehended under the Name of Felony, which is Capital) of *Treason* (when Appeals of *Treason* were admitted) *Murther*, *Robbery*, or such-like, have from Ancient Time in *Appeals* been triable at the Defendants pleasure by the Duel.

* *Cicer. in Orat. pro Cecinnâ.*

Accusato (saith * *Ranulph* of *Glanvil*, Chief Justice under *Henry* II.) *per omnia in curiâ legitimè negante, tunc per* Duellum *solet placitum terminari*; & † Henry *of* Bracton; *habebit electionem, utrum se ponere velit super patriam, vel non, vel defendendi se per corpus suum*; to which ‖ *Britton*, and the course of the Common Laws accord. When the Defendant hath made Choice of this Purgation or Trial, presently (according to those Ancients) so that Exception intercede not, Surety is given on both Parties; on the Defendants for performing his Defence by his Body, on the Appellant for deraigning the Battel; whereupon Day is given by the Court for Provision of their Martial Accoutrements, and arraying themselves in convenient Arms (the Defendant continually remaining in safe Custody:) At the Day prefixt, both Parties prepared, and appearing in Court, the Appellant recites his Appeal, and the Defendant his former Defence, *verbatim*, as at the first. Then the one takes the other by the Hand, and the Defendant with an Oath, thus prepares his Stomach to the Field.

This hear you whom I hold by the Hand, which say you are called by the Christian Name of John, *That I* Peter *such a Year, such a Day and Place,* (*as is expressed in the* Appeal) *did not feloniously cause, nor compass the Death* (if the Appeal be of Murder) *of* Thomas *your Father* (Brother, or *&c.*) *nor did to this Felony assent, as you have before sup-*

* *Glanvil. lib.* 14. *cap.* 1.

† *Bract. lib.* 3. *tract. de coron. cap.* 21.

‖ *Britton. cap. de appeales.*

posed

poſed, ſo GOD *ſhall me help and the Saints.* To which the Appellant replies,

This hear you whom I hold by the Hand, which ſay you are called by the Chriſtian Name of Peter *that you are forſworn, and therefore forſworn, becauſe ſuch a Year, ſuch a Day, and in ſuch a Place, you did feloniouſly with Malice prepenſed, with ſuch a kind of Weapon give a deadly Wound in ſuch a Place of the Body of* Thomas *my Father, whereby he died within one Hour after, as I have before ſaid againſt you, ſo help me* GOD, *and the Saints.*

Theſe Oaths in Effect are compoſed of the ſomewhat different Forms in *Bracton* and *Britton*; but as agreeing to both; only thus much is the Diverſity. *Bracton* adds at the Cloſe of the firſt, *Nec tu hoc vidiſti*, and to anſwer it the Appellant thus encounters him, *Et ego vidi*, which *Britton* hath not. The Reaſon ſeems, becauſe that after *Henry* III's Time, wherein *Bracton* wrote the Statute of * *Weſtminſter*, the firſt in taking away that Particle of Champions Oaths in Tryal of private Rights, was (as I think) by Equity extended unto Appeals alſo, as enſuing Preſidents offer Perſuaſion.

In this Form (by my former Authority) their mutual Oaths taken, the Defendant is committed to the Cuſtody of Two Knights, or Men of meaner Faſhion, *Secundum quod appellatus nobilis fuerit perſona vel ignobilis*, who muſt conduct him unto the Liſts [appointed and ordered by the Marſhal at Commandment of the Judges,) ſo

* *Weſt.* 1. *cap.* 41.

like-

likewise is the Appellant ordered, and both restrained from Speech with any, except their Knights, and the Justices, who before the Battel receive several Oaths of them in this Form. *This hear you Justices that I Peter have neither eaten, nor drunk, nor any other thing done, or caused for me to be done, whence GOD's Law might be depressed, and the Devil's advanced, so help me GOD. Et issint* (saith *John Britton*) *soit fait en toutes les battailes de Felony.* Immediately follows the King's Proclamation, *That no Man be so hardy or bold* (other than the Combatants) *whatsoever he see or hear, as to move, or speak loud, whereby any Disturbance may happen to the Battel, under pain of a Year and a Day's Imprisonment.*

Thus stand the Combatants ready in the Lists, as they are by those ancient Writers marshalled. But before their Battel (to avoid Error in the Proceeding, because some Differences appear,) an Example or two of later times in Our Common-Law-Annals is to be observed.

One * *Adam*, under *Edward* III. brought an Appeal for the Death of his Father against one *John*, who waged Battel in this Form. With his Left Hand he took *Adam* by the Right, and laying his own Right Hand on a Book, swore the Oath before rehearsed, which *e converso* was seconded by the Appellant; the first concluding, *And this I will defend against you by my Body as this Court shall award.* The other, *And this I shall deraisne upon you by my Body according as*

* *Hill.* 17. *Ed.* 3. *fol.* 2. *& lib. ass. pl.* 1.

this

this Court ſhall award. Two main-pernours, Body for Body, were taken for the Appellants Performance on the third Day following; the Defendant committed to the Marſhal with Charge to have him ready armed on the ſame Day alſo, the Coſts of all impoſed on the Parties. All this was at the firſt Appearance and Pleading, and differs from *Bracton*, eſpecially in that Point, as alſo the next following.

* In *Henry* the Fourth; in an Appeal of *Robbery* the Defendant pleads, *Not guilty*, and this was ready to defend by his Body: the Appellant accepts it, and upon this he was commanded by the Court to take the Left Hand of the Defendant in his own Right Hand, and took the Oath with Concluſion of *As GOD me help, and his Saints of Paradiſe*; his Adverſary in like Form ſwore the contrary. The Appellant found two Pledges for the Battel, the Time appointed and Place in *Tuthill-Fields*, the Defendant committed to the Marſhal's Cuſtody; Charge given to the Appellant, that the Night before the Battel-Day he ſhould repair to the Marſhal to be arraied, ſo that he might be in the Field by the Sun-riſing of the ſame Day; to both, to be then ready to perform their *Devoirs*.

Here is another Difference in † Priority of taking the Oath by the Appellant, but the Subſtance of all agree, and offer of Reconciliation

* *M.* 9. *Hen.* 4. *fol.* 4. *& Stamford. lib.* 3. *cap.* 14.

† *Conſuetudines Norm. cap.*68. *id ipſum quod ſuperiores illi & antiquiores, habent.*

of

of such Differences without Diversities were loss of Labour. Hitherto not passing the Limits of Common-Law-Writ touching the Court's ordering the Preamble to this Criminal-Combat. The Combatants are in the Lists, we will now take View of their Armour and Weapons, while they resting prolong their own Quiet, and anon observe somewhat their Performance.

CHAP. VIII.

What Weapons *or* Armour *is to be used (by like Testimony only;) the Success of the Combat, and thereupon* Judgment.

IF you enquire what Weapons and Armour is fittest generally for Combatants use, among others most especially the great Lawyer *Alciat* and a very late Writer of *France*, * *Messiere Marc de la Beraudiere* disputing it may resolve you. I search not, what indefinitely ought to be, but what with us in *England*. They are to fight, saith *Britton*, their Heads uncovered, Hands and Feet naked, with two Bastons tip'd with Horn of one length, and every of them a quadrangular Shield without other Weapon, *dont nul ne puisse auter greiver*. Of their bare hand-fight it might be doubted upon an old President

* *Marc de la Ber. part.* 1. *cap.* 20, *&* 21. *Alciat. de sing. certam. cap.* 39. *Brit. cap.* 23.

under

under * *Edward* the Second, where the Defendant caſt his Glove into the Court upon the Challenge, and upon good Cauſe of Exception, the Judge bids the Appellant, *Then refuſe the Glove.* Where he ſeems in that Admittance to allow it as for a Combatant's Wearing: But, *Hæc ſolvat Apollo.* ‖ Of *Baſtons* and *Shields*, that is, *Fuſtes & Scuta*, the old Law of the *Lombards* gave firſt Uſe, and the expreſs Words of the *Norman Cuſtomary* are, *Qu' ils ne puvent avoir autre inſtrument à greiner l'une l'autre fors l'eſcu & le baſton.* Upon which Words, in reſpect of their Identity with the *Engliſh* Uſage, the ordinary Gloſs is worthy of Obſervation: Thus it ſpeaks; † *Ce text ne parle, ne l'entend quant à la declaracion des armeures, ſi non en regard des non nobles. Et ſi en demandoit purquoy le text ne deſclaire la maniere come les Nobles doivent eſtre armées, l'on pluroit reſpondre que le text ne l'en parle point, pur ce qu' il eſt tout notoire quelles armeures ils dovient avoir pour ſoy combatre.* My other *Engliſh* Authors have no ſuch Difference, nor this neither, which the Cuſtoms have inſerted, that both, ‡ *Doit avoir les cheveulx rougnes par deſſus les oreilles*, unleſs that where it is ſaid in ſome Years, *Que le teſte doit eſtre raſé*, there be ſo much ſignified. The Judgment on their Superiority is, that if the Defendant make his part good until the

* P. 15 *Ed.* 2. *Coron.* 385. *Vide infra, cap.* 13.

‖ *Alciat. cap.* 39.

† *Cuſt. Norm. cap.* 68, & *l' ordinaire gloſſe ſur ceo.*

‡ *Vide* 1 *Hen.* 6. *fol.* 7. & 9 *Hen.* 4. *fol.* 4. *b.* & *cap. ultimum inferius.*

Seats appear in Heaven, or (as the *Norman* Customs hath it) until the time of their Appearance known by the Sun's Absence, the Appellant shall be deemed as vanquished, as a false Accuser punished, and the Defendant acquitted. But if this Defendant yield, or be overcome, * *Ultimo supplicii punietur* (saith *Bracton*) *cum pœna gravi & graviori secundum criminis qualitatem, cum exheredatione hæredum suorum, & omnium bonorum amissione*; If slain, yet the Formality of the Common-Law Proceeding adjudges him to Capital Punishment, that thereby his Posterity may suffer the grievous Concomitancy of his deserved Infamy, and the Accuser *sit de novo* (saith it one in Person of the King) *graund guerdon*.

Rare are the Examples of Battels waged upon Criminals in the Annals of the *English* Laws, and (if I forget not) the least plural Number doubled, comprehends as many as are therein reported with ensuing ‖ Performance. What Histories or other Notes afford of that Nature, is meet by it self to be collected.

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* *Bract. lib. 3. tr. Tractatus, cap. 21.*

† *Brit. fol. 43. Victum non occidat Victor sed regium potius exspectet judicium. Prisot. 27 Hen. 6. fol. 10. b.*

‖ *8 Ed. 3. Rot. North. in. Judgment 225. & 19 Hen. 6. fol. 47. 7 Ed. 3. fol. 310. 25 Ed. 3. fol. 42.*

CHAP.

CHAP. IX.

A Collection of divers Examples out of the English Hiſtories *of Combats upon impoſed Crimes, with ſome Particulars of their Forms and Events.*

UNder *William Rous*, one * *William de Hou* or *Owe* accuſed of Treaſon to the King, challenged his Accuſer to the Battel, *& dum ſegniter ſe expurgat*, (ſaith *Malmesbury*) *cæcatus & exteſticulatus eſt.*

† *Edgar* Son to *Malcolme* of *Scotland*, was accuſed by one *Orgar* an *Engliſhman*, that he privily boaſted himſelf and his Allies, to be the only true Heirs of the Crown; by Champion on *Edgar's* Part it was tried in the Liſts, and the Falſe Accuſer foiled.

‖ *Henry* of *Eſſex*, Standard-bearer to *Henry* the Second, in his *Welſh* Expedition, was accuſed by *Robert de Monte-forti*, that he forſook his Colours in the Field. The Combat was their choſen Judge, the Victory fell to *Mountfort*, *qua de cauſa* (ſaith *Matthew Paris*) *Henricus notam infamiæ ſimul & exheredationis jacturam incurrens indulgentia pii Regis apud Radingum* (where the Liſts were) *habitum monachalem ſuſcepit.*

* *Malmesb. lib.* 4. *de geſt. reg. & Flor. Wigornien. pag.* 456.
† *Georg. Buchanan. Rer. Scotic. lib.* 7. *reg.* 87.
‖ *Flores hiſt. lib.* 2. *pag.* 46. *Matth. Paris in Hen.* 2. *pa.* 133.

That of * *John de Viſcont*, and *Thomas de la March*, in reſpect it was by Conſent to try the Truth of a Caſe emergent out of the Kingdom, neither of them being Subjects here, cannot be material for this purpoſe.

† *John of Anſley*, Knight, appealed *Thomas Carrington* Eſquire of Treaſon, *viz.* that he for a great Sum of Money yielded up the Caſtle of *S. Saviours* in the Iſle of *Conſtantine* in *France* to the *French*, when as he might well have defended it, having ſufficient of all Proviſion, *in qua cauſa cum eodem armigero armorum lege obtulit ſe pugnaturum.* The Matter was upon divers Doubts and Obſtacles delaied in *Edward* the Third's Life-time, and proceeded as little until 3. *Richard* II. when, *Coactis juridicis* (ſo *Thomas* of *Walſingham* tells me) *& ſenioribus militibus regionis, definitum eſt pro cauſa extrinſeca, ſicut pro preſenti cauſa quæ non infra regni limites orta eſt, & pro poſſeſſione rerum tranſmarinarum bene licere quenquam Duello confligere, ſi Conſtabulario & Mareſcallo regni perantea fuiſſet notificata, & in eorum preſentia duellum acceptatum.* Day was appointed, and the Place at *Weſtminſter*. An exceeding conflux of People was from all Parts of the Kingdom. *Rege cum proceribus & regni communitate ingreſſis prout moris eſt* (ſaith my Author) *miles intrat armatus, inſidens dextrarium decentiſſime phaleratum. Nam appellator debet ingredi primò locum, defenſoris præſtolaturus adventum.* A little time after,

* *Apud Stowæum in Annal. ſub Ed. 3. fol. 392.*

† *Th. de Walſingham in Rſc. 2 pag. 237. Edit. German.*

the

the Defendant is thus demanded. Thomas *of* Catrington *Defendant, appear to defend thy Cause, for which Sir* John *of* Anſley, *Knight and Appellant hath publickly and in writing appealed thee*, and thus Thrice by an Herehault. At the Third Proclamation, the Eſquire appears mounted on a Steed *ſtratum regulariter ſtramentis præferentibus arma dicti Thomæ*, who, when he approached the Liſts, diſmounted himſelf, *ne juxta conſuetudines prælii Conſtabularius vendicaret equum ſi limites fuiſſet ingreſſus, ſed nil ſibi valet aſtutia ſua, nam equus juxta liſtas diſcurrens aliquoties totum caput & pectus injecit ultra limites. Ob quam cauſam Conſtabularius* Thomas *de* Woodſtock *equum vendicavit, jurans ſe velle caput ejus habere*, viz. *Quantum inter liſtas de equo viſum fuit, unde adjudicatus eſt ei equus.* The Eſquire entring the Liſts on Foot, the Conſtable and Marſhal produce a certain Indenture made before them, by Conſent of the Parties, containing the Articles of the Accuſation, which were there publickly read. *Catrington* began to offer Exception at ſome of them, thereby thinking to have ſomewhat extenuated the Blots laid on him: But the Duke of *Lancaſter* ſeeing him in Delays, with an Oath openly menaced him, that unleſs, according to the *Duello*-Laws, he would admit all in the Indenture, which was drawn by his Aſſent, as free from being tax'd for Inſufficiency of Form, he ſhould be preſently drawn and hanged as a Traitor. Whereupon the Squire ceaſed from his Exceptions, and intended only the Combat. Sir *John Anſley, Prout moris eſt* (ſaith *Walſingham*) and after him this *Catrington* took

Oath

Oath of the Truth of his Cause, that he was free from all Use of Art Magick; That he did not carry with him any Herb, Stone, or other kind of Experiment of Witchcraft, as hoping thereby for Victory. The Combat it self follows between them. First *Lances*, then *Swords*, afterwards *Fauchions* are their Weapons. The Squire had still the worst, even until *Assley*, although with some Hazard and Doubt, (as you may see in the Author) got the adjudged Victory.

Some five Years after, upon Judgment of the Parliament then holden, * a Combat was fought between one *Mortileto de Vilenos* a Navarrois, appellant, and an *English* Esquire, called *John Walsh*, Defendant. The Accusation was of Treason, but the Truth was, that the chief Motive of *Mortileto*'s Quarrel (as himself afterwards overcome confess'd) was a former discover'd close Combat between his Wife and Squire. But long since *Mars* himself was in that Fault. *Ob quam causam* (saith † *Walsingham*) *idem Navarrus regali judicio* (*qui ad spectaculum Duelli cum principibus regni sui confederat*) *tractus & suspensus est.* Although the Queen and divers others very earnestly entreated his Pardon.

The appointed Lists for the Determination of that great Quarrel 'twixt ‖ *Henry*, Duke of *Here-*

* *Annal. Stowei, fol.* 477.

† *Walsingham. 7 Rich. 2. fest. Martini, fol.* 311. *Edit. Cantabrig.*

‖ *Idem ann. 21. Rich. 2. fol.* 356.

ford,

ford, and *Thomas Mowbray* of *Norfolk*, upon Imputation of some reproachful Terms used against the King by *Mowbray*, is (because of the great Consequent of Crown-Conversion thence following) in every Man's Mouth famous. Yet still respect of the Particulars thereof, well (as all Things else) compil'd by the * Author of the Life and Reign of *Henry* the Fourth, it deserves there the reading, whither I refer you.

† *John Waton* under *Henry* the Sixth, appealed *John Downe*, That he, with his Complices, had imagined the King's Death on the Day of Coronation; *Richard*, Duke of *York*, upon Absence of *John*, Duke of *Bedford*, Regent of *France*, for this Purpose constituted *High Constable* of *England*. The Battel twixt them was fought in *Smithfield*, where, when they had long fought, the King (saith *John Stow*) took up the Matter, and forgave both Parties.

‖ *John David* falsely appealed his Master *William Catur*, an Armourer of *Fleet-street*, of Treason, the Battel waged, the Place appointed in *Smithfield*. *Catur* was so merry with his Friends before the Combat, that when he had most Cause of circumspect Observation, an *Icarian* Shadow so darken'd his Eye-sight, and weaken'd his Forces, that he was unluckily there by his most offending Servant overcome and slain.

Out of these Examples may be gathered some Particulars of our *Duello*-Ceremonies not to be

* *J. Heyward. in vita Henrici quarti, pag.* 45.

† 8. *Hen.*6. *Annal. Stowei, fol.* 609.

‖ *Idem pag.* 635. *Ann.* 25 *Hen.*6.

neglected

neglected. But because a Difference appears between the Jurisdiction here discover'd, and that in the former Examples collected from our Law-Annals and old Writers, separate Disquisition shall endeavour Reconciliation.

CHAP. X.

Who are the Judges, *and have* Jurisdiction *of the Combat.*

Bracton and *Britton*, in their inserted Treatises of the Combat, speak only of the *Kings Justices*, which you must in Criminal Causes understand of the *King's-Bench*: With them agrees *Glanvill*, in these Words; * *Ex quo fuerit Duellum vadiatum, non alio modo nisi de licentia domini Regis, vel ejus Justiciariorum, de cætero possunt sibi ad invicem reconciliari*, speaking expresly of an Appeal of Treason. But in a Term-book of *Henry* the Sixth, two † learned Lawyers affirm, that the Judges before whom the Combat is determinable, are the *Constable* and *Marshal* of *England*, which are to order it by the Law of Arms; concording are the Historical Presidents next before recited. Yet upon Observation of all this seeming contrary Testimony, the Truth will be thus apparent. That when the Appeal is upon Matter disgraceful, or dis-

* *Glanvil. lib.* 14. *cap.* 1.

† *M.* 37 *Hen.* 6. *fol.* 3, *&* 20.

hono-

honourable to Nobility, or the Accuſation in ſuch Form of Terms and Place as cannot be ſufficient Ground of an Appeal by Common-Law-Courſe, as when the Matter (I ſpeak eſpecially of Criminals or Armoury) is not emergent within the Realm, then if the Combat be challenged, the Natural Judges are thoſe two Noble Officers, the *High Conſtable* and *Marſhal* of *England*, to whom belong from Antiquity, a Court called *le Court de Chivalry, ad lites honorarias* (as a *late Writer ſaith) diſcutiendas, juſque ſuum cuique famæ vel dignitatis tribuendum.* For this I have Judge *Priſots* Words. *For calling another falſe, &c. No Appeal* (ſaith he) *lies in our Law, and by Conſequence no ſuch Defence,* viz. *by Proof on Body may be, for ſuch Matter belongs to the Conſtable and Marſhal, and they ſhall determine this by the Law Civil:* Whereunto *Nedham* replies, that it is *le ley del terre, & le ley noſtre ſeignior le roy.* This is infallibly confirmed by the Act of 13 *Richard* the Second, touching the Conſtables Power. † *Al Conſtable appertient d' aver conuſance des contracts touchants faits d' armes & du guerre hors de Realme. Et ainſi des choſes queux touchent armes ou guerre deins le royalme, queux ne poyent eſtre termines ne diſcuſſes per le commen ley, oue autres uſages & Cuſtomes à ycelles matiers appertenants, queux auters Conſtables Devant ore ont duement & reſonablement uſes en leur temps adjouſtant à icel que cheſcun pleintife declara pleniment ſa*

* *Mill. de nobilit. politic. pag.* 154.

† *Stat.* 13 *Rich* II *cap.* 2. *vide inſuper Stat.* 1. *Hen.* IV. *cap.* 14. 30 *Hen.* VI. *fol.* 5. 6. *Hen.* VIII. *Kel.* 171.

matter en ſon petition avant que ſoit enuoy pur aſcun home à reſponder à icell.

Thus, upon due Conference of the former examples with theſe Opinions, and Statute Laws, together with ſome later Credit-deſerving Authority of * *W. Lambard's Archion* (yet unprinted) and other Tradition of Proof, our Old Cuſtoms, and New, and both with, Hiſtorical Relation, may be eaſily made to ſymbolize.

Touching the *Antiquity* and *Name* of the High *Conſtable* and *Marſhal* (which in the propoſed Subject is to be inquired after, ſeeing that by ſome kind of Good Authority I find, that all Trials in their Court, except Diſcuſſion *ex bono & æquo*, were by the † Duel; as in the Articles objected againſt *Richard* II. at his Depoſition is expreſſed) I confeſs I have not read any thing more Ancient than the ‖ Continuance of *Florence* of *Worceſter* his Chronicle, which in the Reign of King *Stephen* thus reports. *Regii Conſtabulatus honorem Miloni Gloceſtrenſi* (who was Earl of *Hereford*, created by *Maude* the Empreſs) *ſuo hoſti ablatum Gulielmo filio Walteri de bello Campo Wigornienſi Vicecomiti dedit.* But, upon that Credit which a good ‡ Antiquary of Right

* *Lambard. in* Ἀρχαιῳ *& Fernæus in lib. de nobilitatis gloria pag.* 312. *cum* 5. *Mar. tit. Battell.* 15.

† *Vide vero Th. Walſingham. pag.* 357. *& I. Heyward. in vita Henrici* IV. *pag.* 92. *Artic.* 26. *necnon Fernæum lib. de nobil. gloriâ pag.* 315.

‖ *Continuat. ad Florent. Wigorn. Ann.* 4. *Steph. pag.* 532.

‡ *Lambard. in* Ἀρχαιῳ *De familiis quæ honoratiſſimo inſignes fuerunt iſto titulo ſeu officio conſulas G. Camd. in Comit. Eſſexiæ & Herefordiæ, ac etiam in provinciâ Monumethenſi, addas & 6. Hen.* VIII. *Kel. fol.* 171. *& Mill. de nob. pol. pag.* 151.

claims

claims to himſelf, I am perſwaded that ſome Officer of the Conſtables Nature, in reſpect that Battel entred with the *Normans*, as anciently alſo adminiſtred this Juſtice, *as it may* (ſaith my Author) *well appear, not only by ſome Records of Hiſtory, but alſo by a Special Preſident that I have ſeen, concerning the whole Order of Proceeding in that behalf before him.*

Of his Name (to leave the ſeveral Forms of Derivation by divers Authors, which you have both collected and cenſured by * *Julius Pacius* in his Notes upon *Curopalata*,) the Judgment of *Johannes Goropius Becanus* and *Richard Verſtegan* having therein divers Followers is thus; That *Cyning* being contracted in *King*, and *Stable* or *Staple* ſignifying a Prop or ſtay, the whole Word *Conſtable* is as much as *Columen Regis*, or one that he eſpecially depends upon in the Managing of his moſt Weighty Affairs. † The Name of *Marſhal* or *Mareſcall* is agreed to, deſcend from two Teutonique Words, (which was the ſame with the Old *French*) *Mare*, which ſignified as much as our general Name of *Horſe*, and *Scalck*, that in the Old *German* and *Gothique* Tongue ſignified a Servant; as one out of *Simeon's* Song

* *Pacius in Notis ad Curopal. ad pag.* 62. *ver.* ὁ μεγας Κονσο σαυλος.

† *Verſteg. pag.* 324. *Lipſ. Epiſt. cent.* 3. *Epiſt.* 43. & *Paul. Merula in Coſmog. part.* 2. *lib.* 3. *cap.* 15. *Vide Paulum Diaconum. lib.* 2. *cap.* 9. *de geſt. Longobardorum & ad eum annotationes noviſſimas Anonymi, Curopalat. cum annot. I. Pacii. ad pag.* 52. *ver.* πρωτοσεβαστος.

in the Hands of that great Linguist *Joseph Scaliger* hath, after others Affirmation of as much, lately observed *Fra leitaß ſcalk theinana* 1. *Now letteſt thou thy Servant depart*; (although *Pacius* turneth *ſchalk* Σκοπος or *peritus*.) So that *Mareſchall* with Us and the *French* is in Notation but *Smith* in *Dutch* and *Engliſh*, *Marphais*, among the old *Lumbards*, *Protoſtrator* in the Eaſtern Empire, expreſſed (if you will in Latin) *Equorum Curator*, whereby (as * *Verſtegan* noteth (we may perceive how Names grown to high Dignity have ſometimes taken their Original from inferior Vocations.

* *Verſteg. pag. 327.*

CHAP.

CHAP. XI.

The Form of Obtaining, clear Proceeding, *and* Performing *the Combat, by the Ancient Law of Arms in the* Engliſh *Court of Chivalry.*

ALthough not with beſt-ſeeming Method, yet with moſt compendious (for narroweſt Order in Comprehenſion,) thus far is diſcovered what in brief Terms is thus connexed. That, of Judicial-Combats Criminal, ſome are for Trial of a Particular objected miſdeed, againſt which the Common-Law by ordinary Courſe proceeds; and of theſe the Juſtices of the *King's-Bench* have the Diſpoſition, as is declared; others for Purgation of Offence againſt Military Honour, and * Tranſmarine Treaſons (remedyleſs by the old Cuſtom of *England*,) which the High Court of Chivalry is to marſhal by the Law of Arms. The manner of this, both in Proceeding and Execution, is much different from the other, therefore of it by it ſelf briefly thus.

A Chartel containing the Accuſation is exhibited to the Judges of Chivalry for Demand of

* *Caterum actis Parliamentariis de* 35. H. 8. *de crimine læſæ majeſtatis trans mare commiſſo cognoſcunt Judices a Rege delegati &c.*

the

the Combat (if the Appellant make choice of a Martial Trial;) the Demand is comprehended in Concluſion; *That he is ready to maintain the ſame by his Body.* Truth of the Chartel, and Freedom of the Appellant from all purpoſe of malicious Wrong, is by his Oath confirm'd. The Combat upon due Conſideration of Circumſtances granted, Denunciation of Challenge, containing the whole Chartel, by Officers of Arms (which was wont to be by ſome private Perſons) is ſent to the Accuſed. If upon the Proceſs he be returned, *Not found*, then the Challenge is publiſhed in his Territories by the Perſon (as religiouſly to be obſerved) of an Herehault.[1] Hereof, at his Peril, he takes notice, and upon Default, after Six Months (which is the Time of Inſtance for the Appellant's Proceeding) is adjudged guilty. But if upon Receit of the Chartel of Challenge he appear not, the Judge may brand him with a Note of Diſhonour hereby purchaſed, of which (but only by undergoing a new Challenge as Actor) he can never be cleanſed; or may, under pain of taking it for a Confeſſion, denounce a new time of Defence, or further, upon Loſs of his Coat-Armour, compel him. If he appear, and make his Defence, but on the Duel-Day (his Adverſary being there preſent till Sun-ſet, and Proclamations of Demand made at Noon and Night, which is peremptory and final) without

[1] *Binther concl.* 56. *Mutio Juſtinopolitano de Duello, lib.* 1. *cap.* 16.

juſt

just Cause hide his Head, it is sufficient Conviction, and without all Hope of Restitution, is his Honour attainted; whereupon (saith * *Alciat*) some Appellants carry the Pictures of such Dastards about them with Exprobration, or their Coat-Armour reversed, or ignominiously fastned under their Horses Tail, or with such like Disgrace. If he stand to his Defence at the appointed Time and Place, (which by an † old Constitution of *Frederick* are at the Defendant's Election, but rather indeed at the Court's Appointment) to be prefixed within forty days, both Parties ought to appear in the Field within the Lists; which are Quadrangular, with Gates at each End (chosen in some spacious Plain,) adjoining whereunto is pitch'd a seemly Pavilion (saith *Ferne*) of Gules, as a Judgment-Seat of the Constable and Marshal; at their Feet a competent Number of experienced Knights, with a King of Arms, and a Doctor or two of the Civil Laws, all for Assistance in Advice to the Court.

The Appellant and his Procurator first come to the Gate on the Right End of the Lists, banded with his Esquires cloathed in his Colours, and array'd with his Arms waiting on him. The Constable and Marshal demand

* *Ex justâ causâ per Campionem se tuetur Reus. Alciat. cap.* 36. *Beuth conc.* 40.

† *Alciat. cap.* 6. *Beuther. concl.* 56. *atque hæc vetus Anglorum Consuetudo quam habes in lib. impress. de honore & armis lib.* 4. *cap.* 8.

by

by Voice of Herald *What he is, and how he comes ſo arrayed?* Upon his Anſwer, and Diſcovery of his Face by removing the Vizor of his Head-piece, he is admitted, and by a Knight, with an Herald of the Province, conducted into the Liſts, and placed before the Judgment-Seat on the Right-hand: In like ſort and converted Solemnity is the Defendant placed, with his Face oppoſite to his Adverſay, on the Left ſide. The * Gloſſe upon the *Norman* Cuſtoms ſay, *Que le cauſe eſt pour ce que le dextre partie eſt plus digne & le ſiniſtre moins digne.* Search is made by the Knights both of Equality of their Weapons (which are alſo at the Defendant's Election, ſo that he confine his Choice within *Ancient, Uſual,* and *Military,* although *Omnium more receptum eſt* (ſaith † *Alciat*) *nobili & generoſo viro magis convenire, ut eques & quidem loricatus congrediatur quam mercenariorum peditum more prodeat, cum equeſtris militia noſtris moribus dignior ſit & in nobilium uſu frequentior. Solent autem (ſi aliter conventum non ſit) in campum omnia geminata arma provocati deferre, ut eorum quæ ipſi in procinctu elegerint paria adverſariis per magiſtros ſeu advocatos dari poſſint;*) as alſo whether they have any Inchantments, or magick Aſſiſtance for the Victory.

Upon Sound of a Trumpet the Appellant and Defendant are ſeverally demanded; who in Perſon preſent, the Regiſter to their Procu-

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* *Gloſſe ordinaire ſur les cuſtomes, cap.* 68. *diſt.* 4.

† *Alciat. cap.* 39, & 40. *vide ſuperius, cap.* 8.

rators,

ration, after Recital of the Proceſs; *Vous Parens facher rien, dire en Empeachement del Combat?* The Procurators affirming that they admit all, it is demanded of the Appellant if he perſiſt in his firſt Purpoſe, and likewiſe of the Defendant; both affirming, the Appellant kneeling, layeth his right Hand on the Evangeliſts, and with his left taketh the Defendant by the Right.

Then the Regiſter. *I. R. Appellant, what ſayeſt thou to S. T. Defendant?*

Hereupon the Appellant briefly rehearſeth his Chartel of Defiance to the Defendant with a concluding Oath for the Truth of his Quarrel, to which the Defendant *è converſo* reciting his Defence, with Denial and Oath reſpectively applied, gives Anſwer, the beginning of both Forms being thus.

* *Hear you this, my Lords, all true Knights and Gentlemen Bearers of Arms, and thou* S. T. *Defendant*, &c. The Concluſion; *and that my Quarrel (or Defence) is true, neither have I done any thing whereby the Law of God and of Knighthood might be depreſs'd, and the Law of Satan enhaunſed, ſo Help me God.*

All this finiſhed, the Parties are ſet a-part and prepare themſelves to the Battel, an Herehault pronouncing *ſoiet la battaile grauntus & victorie à ceux que droit*, with Proclamation, that none be ſo hardy, as by Motion, Speech, or Crying-out to diſcomfite the Combatants, or

* *Forn. lib. de gloria nobilit. pag.* 327.

disturb the Combat; then immediately an Officer at Arms proclaimes, *Approver garde vostre challenge, & vous defendour, garder vostre Defence.* Upon the Sound of the Alarm the Battel begins.

The Time or Instance, (as the Justinianists call it) of the Combat is an Artificial Day from Sun-rising (when the Lists are to be entred) unto Sun-set, *& licet aliqui* (saith my Author) *usque ad stellarum apparitionem permanendum existiment, tamen receptior est sententia ut simpliciter occasus expectetur.* If the Apellant overcome not the Defendant within that time, the Defendant is deemed Guiltless of the Imputation. But, *ben potebbe* († *Mutio Justinopolitano* telleth me) *la patente del campo esser stata spedita con tal forma, che per la partersi del sole la bataglia non si dourebbe partire, o il seguente giorno si dourebbe renovare.*

He to whom either upon Default, (which prejudices the Approver also) or performed Combat, the Victory is adjudged, shall after request of his Procurator to the Constable and Marshal be publickly declared Victor.

But by the way observe that it suffices not that a Superiority appear only in their Manhoods, *Duelli enim is est* (my ‖ Author so says) *finis ut alter vel pereat, vel deditiorem se fateatur.*

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* *Alciat. cap* 41. *de sing. certam. Smith. de repub. Anglor. lib.* 3. *cap.* 3.

† *Mutio Justinopolitano, lib.* 2. *cap.* 12.

‖ *Benther. concl* 65. *Alciat. cap.* 42.

Ante id factum, licet alter videatur superior, tamen propter bellorum casus, quibus quandoque propiores victis sunt victores, non dicitur alter superatus; so that either *Death* or *Disdict*, as they call it, which is yielding or confession of his Guilt, must be the final Issue whereon perfect Victory can be allowed. * Then shall the Victor with an honourable Attendance of Knights and Men of Arms mounted, enter the Field and thrice march round the Lists, and shall take with him the whole Process of the Chartel, Defence, Issue and Judgment, sealed with the Court Seal, in perpetual Testimony of his Performance and maintained Honour. *Morte non secuta*, (saith † *Beuther*) *aut. disdicta non extorta, judex pugnæ contra provocantem pronunciabit eum scilicet capituum esse provocati, eo modo quo provocans devictus fuisset aut confessus provocantis victoris captivus.* Of him that yields, ‖ *permissum est victori* (I have good Authority for it) *arma, vexilla, ephippia, equos, armillas, sibi habere.*

But howsoever Time and the Imperials have hereof judged, not only Christianity now excludes the Laws of Captivity, but also Reasons of Chivalry which you have in ‡ *Marc de la Beraudiere* Lord of *Mauvoisin*, who agrees notwithstanding that the Arms of the yield-

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* *Fern lib. de gl. nobil. pag.* 334.

† *Beuth. conclus* 65. *arg. L. F.C. de Calumnis & C. de accusat. L. f.*

‖ *Alciat. cap* 43.

‡ *Beraudire. part.* 1. *cap.* 24.

ing Combatant are due as yielded with his Body, *& s'il est tue son enemy le peut despouiller & les doit emporter comme estant les vrais marques de sa victoire & n'en doit estre empesche.* So much for the general Form of the obtaining, clear Proceeding, and performing of the Combat, by the Law of Arms.

CHAP.

CHAP. XII.

Private Wrongs *determined by the Duel, and they either touching* Arms *and* Gentry, *or* Right of Land-Inheritance.

OUR Diviſion hath his other part of Trials of private Rights and Intereſts, which are either touching *Gentry and Bearing of Coat-Armour* and ſuch like, or concerning *Right of Demeſnes and Inheritance.*

The firſt of theſe are upon Controverſies of ſuch Nature as were between the * Lord *Grey* of *Ruthen* and Sir *Edward Haſtings*, under *Henry* the Third, for the Coat of the Family of the *Haſtings:* between the Lords *Lovel* and *Morley*, for the bearing of the *Burnels*: *Richard Scroope* and *Robert Gravenor* under *Richard* the Second. Examples of ſuch Titles to Enſigns of Nobility tried by Proof on Body are that of † Sir *John Chandos*, an *Engliſh* Knight, and the Lord *del Clermount*, a *French* Man, for bearing the Image of our Lady, with her Child ſtanding in the Sunne, which by Right of Arms, after the Battel of *Poitiers*, is reported to be won by the *Engliſh* Manhood; and that of ‖ *Hugh Vaughan*, Gen-

* *Mill. de pol. nob. pag.* 153.
† *Roſewell in lib. heraldic. fol.* 79.
‖ VIII. *Hen.* VII. *Stowæus, pag.* 795.

tleman,

tleman-Usher to *Henry* the Seventh, and Sir *James Parker*, slain at the first Encounter in their Combat at *Richmond* before the King. As these Causes and the like, which concern the Differences arising 'twixt Gentlemen for their bearing, are determinable in the Court of Chivalry, so the Duel on them waged is before the same Judges, in such sort as is before shewed, (with respective Sentence) to be managed and performed.

The Respect, which Antiquity in this Kingdom gave to the Trial of Right of Inheritance by bodily Opposition, may be gather'd from that old Tenure, by which the Manor of *Scrivelby* in *Lincolnshire* was long since (and for ought I know) is yet holden, *viz.* by grand Serjeantry that at the Inauguration of *England*'s Kings, the Lord of this Manor for the time being, or some other in his Name, if himself be unable, * *Veniet bene armatus pro guerrâ super uno bono destrario in presentiâ D. Regis die Coronationis suæ & proclamari faciet si aliquis dicere voluerit, quod dictus D. R. non habet jus ad regnum suum & coronam suam, promptus erit & paratus ad defendendum jus Regis & regni sui, & dignitatis Coronæ suæ, per corpus suum versus ipsum & alios quoscunque*, which about † *Edward* the Third's Time was a Servant of the *Frevils*, but at *Richard* the Second's Co-

* *Inquis.* 23. *Edw.* III. *Camden in Coritanis, & in Cornaviis. pag* 406, & 438.

† *Anni* 1 *Rich.* II. *in rot. pat. edit. in Cromptono de jurisdictione Cur. fol.* 85.

ronation,

ronation, upon Claim made to the High-Steward, and Title of Descent by Marriage shewed, was allowed to the *Dimocks*, which now hold it.

This Institution offering (at least for Fashion) to Military Judgment, the Defence of the Supreme Right to the *English* Diadem, hath been in more earnest observed in Debates of private Interests, the ancient Custom of *England* always allowing that as well for Possession of Inheritance (in the Actions which the Lawyers call *Droit patent*, *Droit d'Avouson*, *Quo jure*, *Rationabilibus divisis*, and such like, which aim at the meer Right of the Thing demanded) as for Defence of Life or Honour, ‖ χρήματα δὲ μετὰ τὴν ἀνδρὸς ἕκαστον, Liberty should be given to the Defendant of Provocation from *Jupiter* and *Mercury*, (provided he omit the sharp) to the God of Arms. The Order whereof, and particular Performance, we next enquire after.

‖ Hesiod, in ἔργ. καὶ ἡμερ.

CHAP.

CHAP. XIII.

Combats upon Right of Inheritance in Land-Poſſeſſions, how Granted, Prepared and Determined, with Judgment on them.

THE ancienteſt Combat offer'd in ſuch Civil Cauſes, that I have read of, was in *Richard Cœur de Lion's* Time, to one * *William Briſſet*, upon Demand by one *Emme de* P. of a Knight's Fee in *Corfeton* in *Wiltſhire*, where *Willelmus dixit quod ſunt de uno ſtipite & ideo non debet inde probari.* Where note, That the Demandant in her Count, after diſcloſing her Right, kept that Order which you have in † *Glanvill*, *& hoc prompta ſum probare per hunc hominem meum liberum J. S. & ſi quid de eo male contigerit per illum, vel per illum tertium, & quot voluerit* (ſaith || he) *ita poterit nominare, ſed unus tantum vadiabit Duellum, qui hoc vidit, vel audivit*, which was by Act of Parliament afterwards altered, *Vel per alia verba ſic, & hoc paratus ſum probare per hunc liberum hominem meum J. S. cui pater ſuus injunxit in extremis agens, in fide qua filius tenetur patri, quod ſi aliquando loquelam de terra illa audiret, hoc diracionaret ſicut id quod pater ſuus vidit & audivit.* Thus it ſeems in thoſe Days

* *Mich. 6. Rich. I. rot. 3. ap. Weſt.*
† *Glanvil. lib. 2. cap 3.*
|| *Weſt. 1. cap. 4c.*

it

it was the Courſe for the Demandant to offer his Proof in his Count at the Bar *by the Body of his Freeman*, but ſo that it reſted always in Election of the Tenant (ſo the Lawyers call the Defendant in ſuch caſe) to join Iſſue upon the Offer, or caſt all upon the King's Grand Aſſize; as the ſame Author more largely declares. But the Form ſince thoſe Times (and that moſt frequent in the Law-Annals) hath been to omit the Offer of the Battel in the Count, in lieu whereof a general Clauſe of *Tendering Suit and Proof*, is the common inſerted Concluſion; hereupon the Tenant (with formal Defence of his Right premitted) anſwers; and this Right he is ready to prove by the Body, *either by himſelf, or his Freeman there preſent*, with ſuch enſuing Words, as after *Glanvill*'s Deſcription, the Demandant concluded his Count with. If Exception hinder not, the Demandant replies (with Allowance of Emparlance to prepare his Champion) recounting his firſt declared Right, that he is ready to prove the ſame by his own or the Body of his Free-man there preſent, with particular Names, and Formality of Pleading purſued. Upon Demand by the Court each of the Champions deliver in their Glove (which they before hold in their Right Hands, as they are led by the Partie's Serjeants) as Tokens of mutual Challenge (yet it is * reported, that in *Paramours Caſe* under the late

* *Annal. Stowæi, pag.* 1133.

Queen *Elizabeth*, the Champion of the Defendant only threw down his Glove, which his Adversary in Acceptance of the Challenge took up and brought before him into the Lists.) † The Court further demands of the Demandant's Champion, *Will you upon this Right adventure your Body?* He affirming, his Adversary's Glove (so I understand it) is delivered to him, and respectively in like sort the other is ordered; with a Commandment for Re-delivery of the Gloves. At the same time, or (if the Court think fit, at some other Day given) the Champion of the Tenant is commanded to come over the Bar into the Court, *bare-head, ungirt, uncloaks, and bare-foot*, and commanded to kneel down on the Left Side; the other Champion likewise in every respect, and kneels on the Right Side; the Coart demands of the Serjeants, *If they know any thing why these Champions are not fit for the Combat?* Which admitted, the Gloves are re-delivered to them, within *every Finger a Peny* (which they were commanded by Justice *Thorp* to offer *en l' honneur des cinque plaies que dieu suffre.*) Nothing being moved touching misjoining the Issue, or mispleading, Judgment is given with *Ceſt Court agard que la Battaile ſoit*, such a Day next coming, with Place convenient appointed. The Champions were wont to be sent

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* *Hæc omnia col'igas licet ex Annal. Juris Anglic. 4 Ed. 3. fol. 41. 29 Ed. 3. fol. 12. 30 Ed. 3. fol. 20. 1 Hen. 6. fol. 6. 13 Eliz Dy. fol. 301. & ex annalibus Johannis Stowæi, pag. 1133.*

to

to ſeveral Churches, there to invoke the Aid of ſome Saints to the Aſſiſtance of their Victory, with Charge alſo, that they be not ſuffered in the mean time, to have any Speech together before the Liſts entered. The Champions find Pledges for their Performances; the Parties take charge to have them prepared fit for the Combat againſt the Day appointed. Liſts are made in ſome ſpacious Plain, ſome twenty Paces ſquare, with a Tribunal for the Judges adjoining; into which at the prefix'd time, after the Court ſet, and by Proclamation firſt the Demandant, and then his Champion demanded, the Champion enters the Liſts cloathed at his Diſcretion, *but bare-legg'd from the Knee downward, bare-headed, and bare Arms to the Elbow*, led by a Knight carrying a Baſton Gules of an Ell Length, a Yeoman carrying his Target of double Leather, and, after three reſpectful and ſolemn Congees to the Juſtices, is placed on the Right ſide of the Court, in like manner his Adverſary, in all Equality of Form, placed on the Left ſide. The ſelf-ſame Ceremonies of Proclamation and Oath, as in a criminal Duel before the Juſtices above recited, here uſed, nothing remains but the next ſucceeding Hand-Stroaks. I obſerve to you by the way, that in an old Manuſcript of P. 6. *Ed.* 2 in a Writ of Right between *Thomas* of *Aileſthorp* againſt the Abbot of *Fountaignes*, the Champion was brought to the Bar in the before declared Order, and alſo *Deſchevilè oue un paire des gaunts plies en ſon maine dextre.* Touching

ing his being *deschivelè*, remember what the *Norman* Customs have before also discovered, to which, add the Testimony of an * old Deed made in the time of *Henry* the Third, whereby one *Henry de Ferneberg, dictus marescallus* did bind himself to the *Abbot* of *Glastenbury*, to be his Champion at all Times for the Mannors of *Pucklechurch*, *Kranemer*, *Blackfort* and *Wansscomb* and other Possessions against the *Bishop*, *Dean*, and *Chapter of Bath and Wells*, and against any chosen Champions by them *pro triginta marcis sterlingorum* whereof the Abbot was to pay him ten Marks at the time of waging the Battel, *& in tonsione meâ* (saith the Deed in the First Person) 5. *marcas*.

Upon determination of this Combat, as in the other of Appeals, final and peremptory Judgment is to be given, (*quæ enim* saith † *Glanvil per duellum fuerint terminata perpetuam habent firmitatem*:) and the vanquished without Death, to be judicially noted with perpetual Infamy.

|| Examples of Battels fought, and Judgments given on the Victory are very rare or rather are not in our published Year-books, only a Bout or two is adventured in *Edw.* the Third's Time, in a Writ of Right between *Peverel* and *Sherley*. In the late *Elizabeths Time*

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* *Chartam istam ann.* 42. *Hen.* III. *confectam inter collectanea sua transcriptam ostendit mihi Nicolaus Charles Lancastrensis faciat quem studia mea bene merentem libenter agnoscunt.*

† *Glanvil. lib.* 2. *cap.* 3.

|| 4. *Ed.* 3. *fol.* 41.

Com-

Compoſition prevented the intended Concourſe. But in an Ancient written Parchment Report of the later Years of *Edw.* the First I have ſeen in a *droit Patent* by *John de Crake, Richard de Gurney, & Godefrid de Bello-mont*, for the Mannor of *Greton* in *Suffolk*, againſt the *Abbot* of *S. Edmundsbury* before *Simon* of *Rocheſter* and his Aſſociats Juſtices in Heir there at *Tothull*, that the Abbot offered Battel for his Defence by his Champion *Robert de Mutford*, the Demandant joyning with him by the Body of *Robert Fitz-William le Bret*: *Quo die venerunt partes ſervientes armati, & fuit Duellum inter eos armatum, & percuſſum, & ſerviens prædicti Abbatis convictus fuit & interfectus*; and thereupon a final *Judgment* was given for the Demandant's Recovery.

With ſhort Recapitulation, thus I Conclude; That, from Antiquity Combats of all ſorts have proceeded; that from the *Lumbards* and *Northern People*, whoſe Poſterity filled this Kingdom's Continent, the judicial ſort were hither firſt derived; that the Cauſes were either Criminal or Civil, and both of different Natures, and belonging to different Juriſdictions, and ſo by ſeveral Forms of Combat have been of Right triable; which Forms in general view are here deſcribed. Of particular *Exceptions* to the Apellants, or *Saving Defaults* in the one, or to the Champions or cauſe-ſelf in the other, or any of them, the Treatiſe is too particularly diſpoſed for the Deſign of this Collection; which aimes wholly at the general

Na-

Silius Italicus. lib. 11.

Pax una triumphis
Innumeris potior.

FINIS.

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